Supreme Court, U.S.
FILED

No. __-____ (1)

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IN THE

Supreme Court of the United States

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit corporation,

Petitioner,

—v.—

CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 12, 2000

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QUESTION PRESENTED

Whether a Chicago Ordinance that essentially bans all publicly visible advertising of cigarette products is preempted by Section 5(b) of the Federal Cigarette Labeling and Advertising Act as a "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion of . . . cigarettes . . . ."

PARTIES BELOW

The parties before this Court are those set forth in the caption, which are the same parties that appeared in the United States Court of Appeals for the Seventh Circuit.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Federation of Advertising Industry Representatives, Inc. ("FAIR") states that it has no parent corporations. FAIR is an Illinois not-for-profit corporation consisting of Eller Media Co., Whiteco Outdoor and Outdoor Systems, Inc. Eller Media Co. is wholly owned by Clear Channel Communication, Inc. Whiteco Outdoor is wholly owned by Lamar Advertising Company. Outdoor Systems, Inc. is wholly owned by Infinity Broadcasting Corporation, a subsidiary of CBS Corporation. Clear Channel Communication, Inc., Lamar Advertising Company and Infinity Broadcast Company are publicly held companies.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this case on September 1, 1999.

OPINIONS BELOW

The July 29, 1998 memorandum opinion and order of the United States District Court for the Northern District of Illinois (Shadur, J.) is reported at 12 F. Supp. 2d 844 (N.D. Ill. 1998). It is reprinted in the Appendix hereto at 14a-34a. The September 1, 1999 opinion of the Court of Appeals for the Seventh Circuit is reported at 189 F.3d 633 (7th Cir. 1999). It is set forth in the Appendix at 1a-13a. The October 14, 1999 order of the Court of Appeals denying rehearing *en banc* is unreported and is set forth in the Appendix at 35a-36a.

JURISDICTION

Jurisdiction of this Court to review the judgment of the court of appeals entered on September 1, 1999 is invoked under 28 U.S.C. § 1254(1) (1994). This petition is timely filed within 90 days of the October 14, 1999 denial of rehearing of that judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case requires the Court to determine whether a Chicago Ordinance, Section 5.17 of Title 17 of the Municipal Code of Chicago ("the Ordinance" or the "Chicago Ordinance"), is preempted by the Federal Cigarette Labeling and Advertising Act (the "FCLAA"), 15 U.S.C. § 1331, *et seq.* (1994).

The Ordinance is set forth in the Appendix to this petition at 37a-40a.

Section 5 of the FCLAA provides:

> "(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

15 U.S.C. § 1334 (1994).

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, provides in relevant part that:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

This case presents this Court with a conflict between rulings of the Second, Fourth, Seventh and Ninth Circuits concerning the application of the preemption provision of the Federal Cigarette Labeling and Advertising Act. In this case, Petitioners challenged, on federal preemption grounds, a Chicago Ordinance that virtually eliminates the outdoor advertising of cigarettes throughout the City. The United States Court of Appeals for the Seventh Circuit allowed the ordinance to stand, with the exception of a provision entitling retailers to post "generic" advertisements for cigarettes, which was held to be preempted. The Seventh Circuit's hold-

ing was consistent with a previous ruling of the Fourth Circuit, *Penn Advertising, Inc.* v. *Mayor and City Council*, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), and a subsequent decision of the Second Circuit, *Greater New York Metropolitan Food Council, Inc.* v. *Giuliani*, 195 F.3d 100 (2d Cir. 1999), both of which upheld similar ordinances against preemption challenges for essentially similar reasons. Approximately two and a half months after the Seventh Circuit held the Chicago Ordinance not to be preempted, the United States Court of Appeals for the Ninth Circuit held a virtually identical Resolution, imposed in the State of Washington by the Tacoma-Pierce County Health Department Board of Health, to be preempted in its entirety by Section 1334(b) of the FCLAA. Copies of each of the four decisions are appended to this Petition. (App. 1a-13a, 41a-60a, 61a-74a, and 75a-93a) As a result of these conflicting rulings, the ability to display advertising and promotion of tobacco products on retail premises now varies widely from state to state, and depends entirely on the geographical location of the advertiser.

The Challenged Law

On September 10, 1997, the City of Chicago adopted an amendment to its municipal code essentially banning all publicly visible advertising of cigarettes and alcoholic beverages throughout the city. (App. 37a-40a) The Ordinance provides, with certain narrow exceptions, that:

> "No person may place any sign, poster, placard or graphic display that advertises cigarettes . . . in a publicly visible location. In this section, 'publicly visible location' includes outdoor billboards, sides of buildings, and freestanding signboards."

(App. 39a)

History of the Litigation

(a) The District Court Proceedings

Petitioner FAIR is a not-for-profit corporation consisting of several outdoor advertising companies impacted by the Chicago Ordinance. FAIR filed a § 1983 civil rights action against the City of Chicago ("the City" or "Chicago") challenging the validity of the Chicago Ordinance in the United States District Court for the Northern District of Illinois prior to the local law's effective date on October 30, 1997. The lawsuit was premised upon preemption, First Amendment and Contracts Clause grounds and sought declaratory and injunctive relief, as well as damages and attorneys' fees. Jurisdiction of the district court existed pursuant to 28 U.S.C. §§ 1331 and 1343 (1994).[1]

Following an expedited and extensive discovery schedule, on July 29, 1998, the district court granted FAIR's Motion for Summary Judgment, finding that the Chicago Ordinance was preempted, in its entirety, by Section 1334(b) of the FCLAA. The court permanently enjoined the City and its agents from enforcing the Ordinance.

In defense of the Ordinance, Chicago advanced two primary arguments: (1) that the Ordinance was not "based on smoking and health" because its articulated purpose was to prevent and protect minors from engaging in illegal purchases of cigarettes and was therefore not health-related, and (2) that the Ordinance was not "with respect to the advertising and promotion of any cigarettes" because, like a similar Baltimore

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[1] The 1998 settlement agreement between the major cigarette manufacturers and the states, including Illinois, does not affect Petitioner's case. While the settlement agreement does include some consented-to advertising restrictions, it continues to permit advertising that Chicago Ordinance would eliminate—specifically, indoor and outdoor advertising displayed on the premises of retail establishments that sell tobacco products. Furthermore, the agreements apply only to their private signatories, which do not include Petitioner's members.

ordinance that had survived a preemption challenge in the Fourth Circuit (*see Penn Advertising, supra*), the Ordinance supposedly restricted only the location of cigarette advertisements, rather than their content. The district court rejected both arguments. (App.21a-30a)

The district court first rejected the City's claim that the Ordinance was not related to health concerns simply because its stated purpose was to prevent and protect minors from engaging in illegal purchases of cigarettes. Noting that the Illinois laws aimed at illegal sales of cigarettes to minors were themselves based on smoking and health concerns and relying upon this Court's decision in *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) for the proposition that courts are not bound by the articulated purpose of an ordinance for preemption purposes, but must rather consider both its actual purpose and effect, the district court concluded that the Ordinance's prohibitions were "unquestionably based upon smoking and health." (App. 29a-30a, n.8)

The district court also rejected the City's second argument against preemption, the so-called "content/location distinction," which the court found to be "based on a false dichotomy that is not found in the Preemption Statute itself." (App. 23a) Rejecting explicitly the Fourth Circuit's reasoning in *Penn Advertising, supra*, the court reasoned that "the very nature and origin of Chicago's Ordinance bring it squarely within the literal coverage of the Preemption Statute, leaving no room for a reading that deviates from that coverage" (App. 22a):

> "To be sure, a 'requirement . . . with respect to the advertising or promotion of . . . cigarettes' may well consist of a regulation of advertising *content* (for example, the same kind of state-dictated or locally-dictated delivery of information that was the sole subject of the original 1965 version of the Preemption Statute, or that was the subject of the ordinance at issue in *Vango Media*). But, by contrast, a 'prohibition . . . with

> respect to advertising . . . of cigarettes' denotes a flat-out *bar* of such advertising—and if such a bar in terms of location is indeed 'based on smoking and health,' it is still specifically forbidden by the express terms of the Preemption Statute."

(App. 22a-23a) The district court concluded that the Ordinance was preempted in its entirety. In light of its preemption ruling, the court found it unnecessary to reach Petitioner's additional arguments. (App. 33a, n.9)

(b) The Ruling of the Court of Appeals

On September 1, 1999, the United States Court of Appeals for the Seventh Circuit reversed the district court's decision as it applied to the bulk of the Ordinance, affirming the decision only insofar as it pertained to one of the Ordinance's exceptions. (App. 1a-13a) The court of appeals recognized that under the plain language of Section 1334(b) all of the Chicago Ordinance would fall within the preemptive scope delineated by Congress. The court did not deny that that the Ordinance was "a requirement or prohibition," or that it was "based on smoking and health," or that, on its face, it was "with respect to the advertising or promotion . . . of cigarettes." But the court nevertheless refused to read Section 1334(b) that way, cautioning against an "overly literal" interpretation of Section 1334(b) that would "read the presumption against pre-emption out of law whenever Congress speaks to the matter with generality." (App. 7a, quoting *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)) Instead, it dismissed the express language used by Congress—language which this Court described in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), as "provid[ing] a 'reliable indicium of congressional intent with respect to state authority," *id.* at 517—as being so "expansive" and "unhelpful" that it provided no aid to the court in determining Congress' intent. (App. 5a-7a) Rather than give effect to the language of Section 1334(b),

the Seventh Circuit concluded that it had to "go beyond the unhelpful text" to determine its meaning and found in the policy stated in Section 1331 of the FCLAA—to avoid "diverse, nonuniform and confusing advertising standards"[2]—a basis for concluding that "mere" location restrictions on cigarette advertising do not create the kind of "diverse, nonuniform and confusing" advertising regulations Congress sought to avoid. (App. 5a-13a) Applying the same anti-textual content/location distinction that had been applied by the Fourth Circuit in *Penn Advertising* (App. 70a-71a) (and was applied by the Second Circuit less than two months later in *Greater New York Metropolitan Food Council* (App. 56a-57a)) in holding similar legislation not to be preempted, the Seventh Circuit held that the bulk of the ordinance was not preempted because it was "merely" a "land use provision" and because it restricted the location and not the content of tobacco product advertising.[3] (App. 10a-12a)

FAIR filed a Petition for Rehearing *En Banc*, which was denied on October 14, 1999. (App. 35a-36a) Approximately one month later, the Court of Appeals for the Ninth Circuit in *Lindsey* v. *Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999), held a virtually identical scheme designed to limit tobacco advertising in Tacoma, Washington to be preempted for many of the very reasons relied upon by the district court in this case and rejected by the Seventh Circuit. (App.75a-93a) The Ninth Circuit was aware of, and explicitly rejected, the reasoning of the Seventh Circuit. (App. 86a-89a)

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[2] 15 U.S.C. § 1331 (1994).

[3] The court held that paragraph 3 of the Ordinance, which permitted cigarette advertisements containing generic advertising content throughout the City was preempted on the ground that it was a content-based limitation on cigarette advertising. (App. 12a-13a)

REASONS FOR GRANTING THE WRIT

I

The Seventh Circuit's Decision In This Case Results In A Circuit Split That Directly Undermines Congress' Intent In Passing The FCLAA

The Seventh Circuit's opinion in this case directly conflicts with a ruling of the Ninth Circuit in a nearly identical case, *Lindsey* v. *Tacoma-Pierce County Health Department*.[4] (App. 75a-93a) In *Lindsey*, the Ninth Circuit struck down a Resolution of the Tacoma-Pierce County Health Department (the "Resolution"), effectively banning outdoor tobacco advertising in Pierce County, Washington, on the ground that it was preempted by Section 1334(b). The Resolution in *Lindsey*, like the Chicago Ordinance, essentially banned all cigarette advertisements in publicly visible locations throughout the county, with only a few exceptions. (App. 77a-79a) Unlike the Seventh, Second, and Fourth Circuits, the Ninth Circuit held the legislation before it preempted in its entirety under Section 1334(b).[5]

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[4] The *Lindsey* court, like the Seventh Circuit in this case and the Second Circuit in *Greater New York Metropolitan Food Council*, reversed the district court's decision below. *See Lindsey* v. *Tacoma-Pierce County Health Department*, 8 F. Supp. 2d 1213 (W.D. Wash. 1997) (holding that no part of Resolution essentially banning outdoor advertising of cigarettes was preempted by the FCLAA), *reversed by Lindsey*, 195 F.3d 1065 (9th Cir. 1999); *Greater New York Metropolitan Food Council, Inc.* v. *Giuliani*, No. 98 Civ. 251 (DAB), 1998 WL 879721 (S.D.N.Y. Dec. 16, 1998) (holding that ordinance restricting outdoor tobacco product advertising was preempted by FCLAA in its entirety), *reversed by Greater New York Metropolitan Food Council*, 195 F.3d 100 (2d Cir. 1999). This diversity of opinions on the meaning of Section 1334(b) illustrates the extent of the confusion surrounding this important issue. *See also Rockwood* v. *City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998) (holding ban of outdoor advertising of cigarettes to be preempted).

[5] On December 28, 1999, the Ninth Circuit ordered the parties to file simultaneous briefs setting forth their respective positions on whether

The Board of Health in *Lindsey*, like Chicago here, did not contend that the plain language of the FCLAA failed to preempt its ban on outdoor tobacco advertisements. (App. 84a) Rather, the Board, like the City here, sought (in the language of the Ninth Circuit) "to evade the express language of the FCLAA's preemption provision" by "arguing that the FCLAA does not preempt its resolution because the FCLAA only preempts local laws that regulate the content rather than the location of cigarette advertisements." *Id.* The Ninth Circuit, relying on this Court's decision in *Cipollone*, dismissed this argument, explicitly rejecting the decisions of the Seventh, Second, and Fourth Circuits and finding instead that the content/location distinction set forth in those cases "ignores the history, purpose, and language of the FCLAA and is not supported by Supreme Court precedent." *Id.*

The Ninth Circuit looked first to the plain language of Section 1334(b), concluding that the resolution was "preempted by the clear and express language" as a (1) requirement or prohibition, (2) based on smoking and health, (3) with respect to the advertising or promotion of cigarettes. The Resolution, the court concluded was (1) a local law, (2) pertaining to health matters related to cigarette smoking, that (3) expressly prohibited outdoor tobacco advertisements and regulated point of sale information. (App. 83a-84a)

The *Lindsey* court then examined—and rejected as "not supported by the plurality decision in *Cipollone*" (App. 86a)—the efforts of the Fourth, Second and Seventh Circuits to exalt what they perceived to be the "purpose" of Section 1334(b) over the plain language of the statute. Noting that both the Seventh and Second Circuits "[r]ecogniz[ed] that the

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the *Lindsey* case should be reheard *en banc*. In fact, the Tacoma-Pierce Health Department has determined not to appeal the ruling of the Ninth Circuit. *See Seattle Times*, Dec.5, 1999, at B3. This Court will have the opportunity to resolve the circuit split only by granting review in this case and/or the *Greater New York Metropolitan Food Council* case from the Second Circuit, as to which a petition for a writ of *certiorari* is being filed contemporaneously.

text of the FCLAA preemption provision does not support the artificial distinction between content and location restrictions," the Ninth Circuit criticized the decisions of its sister circuits for erroneously "turn[ing] to the Congressional purpose behind the FCLAA for support" for this distinction and for misconstruing that purpose by incorrectly concluding that location restrictions "do not lead to the 'diverse, nonuniform, and confusing' advertising standards that Congress aimed to prevent by promulgating the FCLAA preemption statute." (App. 86a-87a) The court concluded that:

> "The distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 1334(b) supports the preemption of a ban on outdoor tobacco advertising. . . . [T]he failure to preempt location restrictions on tobacco advertising will place an unjustifiable burden upon a tobacco advertiser to consult local regulations concerning the placement of tobacco advertisements in every locality in which it wishes to advertise. The bans on outdoor advertising in *FAIR*, *Giuliani*, and this case present a good example of the multitude of different regulations tobacco advertisers face. . . . [As a result of these separate advertising regulations], a tobacco advertiser is faced with diverse and nonuniform tobacco advertising regulations depending solely upon the politics of the locality of the advertising. This is precisely the result Congress was trying to avoid in promulgating Section 1334(b)."

(App. 87a-88a) (internal citations omitted)

The Ninth Circuit further concluded that the history of Section 1334(b) did not support the content/location distinction of the Seventh and Second Circuits, noting that the distinction was inconsistent with this Court's interpretation of the 1969 amendments in *Cipollone* as broadening the scope of preemption *beyond* state laws that only regulated the "content" of tobacco advertisements. (App. 89a-90a) The court

noted that the 1965 preemption provision of the FCLAA provided that, "[n]o *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes." (App. 89a, quoting 15 U.S.C. § 1334(b) (1964 & Supp. I 1965)) (emphasis in original), and that this provision was amended in 1969 to its present form. Quoting *Cipollone*, the Ninth Circuit pointed out that the language of the current preemption provision is "much broader" than the 1965 version in at least two ways:

> "First, the later Act bars not simply 'statement[s],' but rather 'requirement[s] or prohibition[s] imposed under State law.' Second, the later Act reaches beyond statements 'in the advertising' to obligations 'with respect to the advertising or promotion' of cigarettes."

(App. 89a, quoting *Cipollone*, 505 U.S. at 520) See also *Medtronic Inc.* v. *Lohr*, 518 U.S. 470 (1996) 518 U.S. at 488 n.9 (noting that "the statute in *Cipollone* was clearly intended to have a broader preemptive effect than its 1965 predecessor"). The court held that "[t]o give effect to the 1969 amendments, the distinction between content regulations and location regulations cannot . . . be sustained because the 1965 statute only preempted content regulations and the 1969 amendments broadened the scope of preemption beyond state laws that regulated only the content of tobacco advertisements." (App. 90a)

Finally, the *Lindsey* court held that the structure of the FCLAA itself, when viewed as a whole, militated against the content/location distinction upheld by the other courts of appeal. Specifically, the court noted that the FCLAA's other preemption provision, which provides that "[n]o statement relating to smoking and health . . . shall be required on any cigarette package," 15 U.S.C. § 1334(a), stands in sharp contrast to Section 1334(b) in that, unlike Section 1334(b), it is directed only at specific "statements" relating to smoking and health. As the Ninth Circuit noted, "[i]n order to distinguish between the language currently used in § 1334(a) from the language currently used in § 1334(b), § 1334(b) must be read

as preempting more than just content regulations." (App. 90a) To accept the content/location distinction, the court noted, would be "to give 'requirement or prohibition' in subsection (b) essentially the same meaning as 'statement' in subsection (a), thereby ignoring the basic principle of statutory construction that different words in the same statute must be given different meanings." (App. 90a)

There is thus a direct conflict between the preemption rulings that now govern in the 11 states within the three circuits that have held legislation such as the Chicago Ordinance not to be preempted and in the 9 states within the Ninth Circuit that has held such legislation to be preempted. The split amongst the circuits on this important issue should now be resolved.[6]

II

The Seventh Circuit's Decision In This Case Conflicts Directly With This Court's Opinion In *Cipollone*

The Seventh Circuit's opinion is not only in conflict with the Ninth Circuit's decision in *Lindsey*, but is also in direct conflict with *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504

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[6] The circuit split on the meaning of Section 1334(b) also warrants review by this Court because the very fact of the split undermines the very Congressional purpose behind the FCLAA of preventing "diverse, nonuniform, and confusing" cigarette "advertising regulations" and of protecting "commerce and the national economy" to "the maximum extent consistent with" the policy of informing the public about the health risks of smoking. *See* 15 U.S.C. § 1331(2) (1994). State and local tobacco advertising regulations, such as those challenged in *Penn Advertising*, *Greater New York Metropolitan Food Council*, *Lindsey*, and this case, have been passed in cities throughout the country, each setting different restrictions on tobacco products advertising. These regulations impose a significant burden on tobacco advertisers, such as Petitioner's members, who must on their own, figure out local, state and national advertising regulations. This is the very "diverse, nonuniform and confusing" result Congress sought to avoid by passing the FCLAA.

(1992), the only case in which this Court has directly addressed the meaning of Section 1334(b). In *Cipollone*, a divided Court held that Section 1334(b) preempted certain common law claims against cigarette manufacturers, but did not preempt other such claims. *Id.* at 520-530.[7] The Seventh Circuit's approach to interpreting Section 1334(b) ignores those aspects highlighted by this Court in *Cipollone* as most important—specifically, the plain language of the statute and the 1969 amendments broadening its preemptive scope.

A majority of the Court in *Cipollone* concluded that "the preemptive scope of [Section 1334(b)] is governed entirely by the express language of [Section 1334(b)]." *Cipollone*, 505 U.S. at 517 (plurality opinion); *id.* at 531-32 (Blackmun, J., concurring in part and dissenting in part) (agreeing with plurality that express language of Section 1334(b) is determinative). Finding that Section 1334(b) "provide[d] a 'reliable indicium of congressional intent with respect to state authority,' " a majority of the Court also explicitly rejected the lower courts' implied preemption analysis, which the Court faulted for looking beyond the text of the statute. *Id.* at 517 (plurality opinion); *id.* at 531-32 (Blackmun, J., concurring in part and dissenting in part). Finally, and most notably, the *Cipollone* Court unanimously agreed that the plain meaning of Section 1334(b) was of primary importance in interpreting the preemptive scope of the FCLAA. *See* 505 U.S. at 521-22 (" 'We must give effect to this plain language [of Section 1334(b)] unless there is good reason to believe Congress intended the language to have some more restrictive meaning.' In this case there is no 'good reason to believe' that Congress meant less than what it said.") (internal citation omitted); *id.* at 532 ("[A]n interpreting court must 'begin with

[7] The plurality opinion was written by Justice Stevens and joined by Chief Justice Rehnquist and Justices White and O'Connor. Justice Blackmun's opinion, joined by Justices Kennedy and Souter, concluded that none of petitioners' claims were preempted by the FCLAA. Justice Scalia's opinion, joined by Justice Thomas, concluded that all of petitioners' claims were preempted by the FCLAA.

the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.' ") (Blackmun, J., concurring in part and dissenting in part) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)); *id.* at 544 ("[O]ur job is to interpret Congress's decrees of preemption neither narrowly nor broadly, but in accordance with their apparent meaning.") (Scalia, J., concurring in part and dissenting in part).

As the *Lindsey* court noted, the Seventh Circuit's opinion simply refuses to take the plain language of Section 1334(b) seriously, as required by *Cipollone*.[8] (App. 86a-89a) The Seventh Circuit's concerns about the dangers of adopting an "uncritical literalism" in reading Section 1334(b) stand in stark contrast to this Court's repeated assertion that the plain language of Section 1334(b) is controlling. Focusing not only on the "with respect to" language of § 1334(b), but on the entire provision as a whole, this Court made clear in *Medtronic*, 518 U.S. 470, that the text of Section 1334(b) is hardly as unboundedly expansive as the Seventh Circuit suggests, but is rather "targeted at a limited set of state requirements—those 'based on smoking and health'—and then only at a limited subset of the possible applications of those requirements—those involving the 'advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of' the federal statute." *Id.* at 488. *See also Cipollone*, 505 U.S. at 517, 521-22 (noting the clarity of the language of Section 1334(b)). The refusal of the Seventh Circuit to give effect to the plain meaning of Sec-

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[8] The same is true of both the Second Circuit's decision in *Greater New York Metropolitan Food Council* and the Fourth Circuit's decision in *Penn Advertising*, both of which upheld similar tobacco advertising ordinances (except for a tombstone provision in the ordinance at issue in *Greater New York Metropolitan Food Council*) against a preemption challenge on the basis of the content/location distinction. *Greater New York Metropolitan Food Council*, 195 F.3d at 107-110; *Penn Advertising*, 63 F.3d at 1324.

tion 1334(b) is thus in stark contrast to this Court's jurisprudence.

Moreover, the ERISA case cited by the Seventh Circuit (App. 5a-7a) in support of its reading of Section 1334(b), *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645 (1995), simply does not support the Seventh Circuit's approach. This Court's preemption jurisprudence makes clear that the language of ERISA is simply too different from that of the FCLAA to permit interpretation of the former to dictate that of the latter. *Compare Travelers Insurance Co.*, 514 U.S. at 656 (ERISA text described as "unhelpful") with *Cipollone*, 505 U.S. at 517 (FCLAA text described as clear). *See also Medtronic*, 518 U.S. at 488 (holding out Section 1334(b) as reasonable in scope and contrasting it with 21 U.S.C. § 360k(a), the broad preemption provision at issue in that case).

The Seventh Circuit's treatment of the legislative history of Section 1334(b) also runs counter to this Court's examination of that legislative history in *Cipollone*. Specifically, the Seventh Circuit's opinion fails to appreciate the significance of the central element of the legislative history of Section 1334(b) identified by this Court in *Cipollone*, namely, that the 1965 version of the statute—which was narrow and specifically targeted advertising content —was amended in 1969 to broaden significantly the preemptive scope of the statute. If, as the Seventh Circuit suggests, Congress was merely concerned with ensuring uniform regulation of cigarette advertising content, the adoption in 1969 of a "much broader" preemption provision (as this Court described it in *Cipollone*) would hardly have been necessary. *See* pp. 10-11 above.

Finally, the content/location distinction of the court of appeals runs directly counter to this Court's recognition in *Cipollone* that a ban on advertising in particular media is precisely the kind of "diverse, nonuniform, and confusing" regulation that Congress sought to end when amending Sec-

tion 1334(b) in 1969. *See Cipollone*, 505 U.S. at 515 n.11 (citing a California state ban on print and electronic cigarette advertisements as the type of diverse, non-uniform and confusing cigarette advertising regulation that prompted the broadening of Section 1334(b) in 1969). Even the Justices in *Cipollone* who viewed the 1969 Amendments to Section 1334(b) as "nonsubstantive in nature" (and who narrowly interpreted Section 1334(b)) acknowledged that, by adding the word "prohibition," Congress sought to "ensure that a State could not do through negative mandate (*e.g., banning all cigarette advertising*) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements). . . ." *Cipollone*, 505 U.S. at 539 (Blackmun, J., concurring in part and dissenting in part) (emphasis added). This is precisely what the Chicago Ordinance tries to do through its draconian "location" restrictions.

In short, entirely apart from the direct circuit split that this case raises, the Seventh Circuit's opinion in this case ignores this Court's analysis in *Cipollone* to reach a result that Congress never intended. The case is well worthy of review.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Dated: New York, New York
January 12, 2000

Respectfully submitted,

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